

TRANS HUU THO & ORS

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v.

PP AND ANOTHER CASE

HIGH COURT SABAH & SARAWAK, KUCHING

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DAVID WONG DAK WAH J

[NOS: 43-6-2008-III & 43-7-2008-I]

23 DECEMBER 2008

CRIMINAL PROCEDURE: *Revision - Conviction on plea of guilt - Whether magistrate duty-bound to inform unrepresented accused that they were entitled to legal representation - Whether failure to do so vitiated whole proceedings*

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CRIMINAL PROCEDURE: *Accused - Right to counsel - Whether magistrate duty-bound to inform unrepresented accused that they were entitled to legal representation - Whether failure to do so vitiated whole proceedings*

D

CRIMINAL PROCEDURE: *Plea of guilty - Absence of counsel - Whether magistrate duty-bound to inform unrepresented accused that they were entitled to legal representation - Whether failure to do so vitiated whole proceedings*

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CONSTITUTIONAL LAW: *Fundamental liberties - Right to counsel - Whether magistrate duty-bound to inform unrepresented accused that they were entitled to legal representation - Whether failure to do so vitiated whole proceedings*

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The applicants in this case, all of them of Vietnamese origin, were the crew of two Malaysian fishing vessels. They were apprehended by the marine police for using the illegal “pair trawl net” method of fishing and charged accordingly. All the applicants pleaded guilty and the masters of both vessels were fined RM300,000 each and in default six months’ imprisonment, and the crew of both vessels were fined RM60,000 each and in default four months’ imprisonment. It was not disputed by the deputy public prosecutor that the magistrate, prior to taking the plea, had not informed the applicants that they could engage legal representation should they so wish. The issue herein was whether there was a duty on the magistrate to inform the unrepresented applicants that they were entitled to legal representation and, if so, whether the failure to do so vitiated the whole proceedings.

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A Held (setting aside the whole proceedings, and ordering that the plea be taken before another magistrate as soon as possible):

B (1) Every accused person has both a constitutional and statutory right to be defended by counsel of his or her choice. In the context of this case, the applicants, as the accused, should have been told by the magistrate that they were entitled to legal representation and, if they so wished, the court would adjourn the matter for them to engage counsel to act for them. If the constitutional right to engage counsel is to have any meaning, the accused must be informed of this right. The court and the law cannot presume that citizens of this country, let alone foreign citizens, know their rights. The reality is that most do not know and unless they are informed of these rights, they are meaningless rights. Accordingly, the magistrate should, in law, have informed the applicants that they were entitled to engage legal representation. (paras 7 & 8)

E (2) Although a magistrate has a duty to inform unrepresented accused of their right to legal representation, the failure to do so by itself does not automatically amount to a miscarriage of justice. Each case must be considered on its own circumstances. In this instance, apart from the aforesaid failure, the other relevant circumstance was the fact that the court's acceptance of the applicants' guilty plea resulted in the mandatory forfeiture of the vessels. Fair play and natural justice dictated that the magistrate should have enquired from the prosecution or the applicants as to whether the owners of the vessels had been informed of the charges against the applicants. The magistrate should have taken steps to ensure that the owners were made aware of the court proceedings prior to accepting the applicants' plea. Although the charges were in fact against the applicants and not the owners, the consequence of the applicants' guilty plea had grave financial ramifications on both the owners and the applicants in that the two vessels may have been the only tools of earning income for the owners. It was a simple application of the basic principle of one's right to be heard; hence, the owners of the vessels ought to have been made aware of the charges against the applicants. (para 10)

(3) Accordingly, because of the omissions above, it would be unsafe to accept the applicants' guilty plea. (para 11) A

Case(s) referred to:

PP v. Kulasingam [1974] 1 LNS 118 (*refd*)

Kong Siew Yap v. R [1950] SCR 41 (*dist*)

Hock Huat Chan Sdn Bhd v. Assan Mohammad & Others [2008] 4 CLJ 512 HC (*refd*) B

Legislation referred to:

Criminal Procedure Code, s. 255

Federal Constitution, art. 5(3)

Fisheries (Prohibition of Method of Fishing) Regulations 1980, reg. 2, Sch 1 C

Fisheries Act 1985, ss. 25(a), 26(1)

Penal Code, s. 34

For the applicants - Alex Yeo; M/s YO Leong & Co D

For the respondent - Robert Pasang DPP

Reported by Suresh Nathan

JUDGMENT E

David Wong Dak Wah J:

Proceedings

[1] Mr. Alex Yeo (Mr. Yeo), counsel for the applicants, wrote to this court *via* a letter dated 16 October 2008, urging it to call up the records of the magistrate's court in respect of the convictions of the applicants for revision. Various grounds were put forth by Mr. Yeo but after hearing the submissions, the determinative issues for my consideration are as follows: F

1. Whether there is a duty on the part of the magistrate to inform the applicants, who at the material time were unrepresented by counsel, that they had the right to engage legal representations? H

2. If so, whether the failure to do so vitiates the whole proceeding?

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A The Law

[2] This is clearly stated in the case of Hashim Yeop Sani J in *PP v. Kulasingam* [1974] 1 LNS 118 referred to by Mr. Yeo in his submission which reads as follows:

- B** The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to sub-sections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice.
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Brief Facts

- D** [3] All the applicants are of Vietnamese origin and were apprehended by the Marine police on 15 September 2008. The applicants were crew of two fishing vessels both of which had Malaysian registration, making them local vessels. The applicants were jointly charged in the Kuching Magistrate Court on 30 September 2008 for an offence under Regulation 2 Schedule 1 of the Fisheries (Prohibition Of Method of Fishing) Regulations 1980 read together with s. 26(1) of the Fisheries Act 1985 and s. 34 of Penal Code and punishable under s. 25(a) of the Fisheries Act 1985. In short they were found fishing using the “pair trawl net” method which is illegal. However two case dockets were opened and the applicants of each individual vessel were charged separately.
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- F**
- G** [4] All the applicants pleaded guilty to the charges. The masters of both vessels were fined RM300,000 each, in default six months imprisonment and the crews of both vessels were fined RM60,000 each and in default four months imprisonment.

Issue No. 1:

- H** **Whether There Is A Duty On The Part Of The Magistrate To Inform The Applicants, Who At The Material Time Were Unrepresented By Counsel, That They Had The Right To Engage Legal Representations?**

- I** [5] It is not disputed by the learned DPP that the learned magistrate, prior to taking the plea, had not inquired or informed the applicants that they can engage legal representation should

they so wish. However it is the submission of the learned DPP that there is no such duty on the magistrate to do so and relied on the Privy Council case of *Kong Siew Yap v. R* [1950] SCR 41 (PC) which held that there is no duty on the judge or anybody to appoint anyone to represent an accused, and omission to provide the accused with legal assistance cannot be a ground for challenging a conviction. With respect to the learned DPP, the just cited case is not relevant to the present case as in that case it concerned a duty to appoint legal representation whereas in this case we are concerned with the duty to inform the accused of their rights to legal representation.

[6] The counsel for the applicants and the learned DPP both conceded that there is no legal provision in law which requires the magistrate to inform the applicants that they are entitled to legal representation. They also concede that they have not found any case which is relevant to the issue at hand. Be that as it may, the starting point in determining this issue must be art. 5(3) of the Federal Constitution and s. 255 of the Criminal Procedure Code which respectively provides as follows:

Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

And

Subject to any express provision of law to the contrary, every person accused before any Criminal Court may of right be defended by an Advocate.

[7] What we have here is this. Every accused person has both a constitutional and statutory right to be defended by counsel of his or her choice. I have in the case of *Hock Huat Chan Sdn Bhd v. Assan Mohammad & Others* [2008] 4 CLJ 512 stated that constitutional rights must be guarded zealously by the courts and in the context of this case it is my view that the applicants, as accuseds, should have been told by the learned magistrate that they are entitled to legal representation and if they so wish the court will adjourn the matter for them to engage counsel to act for them. My reason for such requirement is simple. If the constitutional right to engage counsel is to have any meaning, the accuseds must be informed of this right. I have said on previous

A occasions that the court and the law cannot presume that citizens of this country, let alone foreign citizens, know their rights. The reality is that most do not know and unless they are informed of these rights, they are meaningless rights.

B [8] Accordingly I find that the learned magistrate should, in law, have informed the applicants that they are entitled to engage legal representation.

C [9] Magistrates and Sessions Court Judges should be well advised to refer to the Criminal Trial Court Bench Book published by the Judicial Commission of New South Wales, Australia and accessible at [http:// www.judcom.nsw.gov.au/publications/publications.php](http://www.judcom.nsw.gov.au/publications/publications.php) where it sets out guidelines as to how presiding legal officers should approach for unrepresented accuseds.

D **Issue No. 2:**

If So, Whether The Failure To Inform The Accuseds Of Their Right Of Legal Representation Vitiates The Whole Proceeding?

E [10] This issue depends on the court's finding whether this failure to inform has resulted in a miscarriage of justice in the circumstances of this case. Let me start by stating that though I have held that the magistrate has a duty to inform unrepresented accuseds of their right to legal representation, the failure to do so by itself does not automatically amount to a miscarriage of justice. Each case must be viewed at on its own circumstances which I now do for this case. Apart from the aforesaid failure, the other relevant circumstance in this case is the fact that the court's acceptance of the accuseds' guilty plea resulted in the mandatory forfeiture of the vessels. Fair play and natural justice, in my view, dictate that the magistrate should have enquired from the prosecution or the accuseds as to whether the owners of the vessels had been informed of the charges against the accuseds. The magistrate should have taken steps to ensure that the owners were made aware of the court proceedings prior to accepting the plea of the accuseds. I am fully aware of the fact that the charges are in fact against the accuseds and not the owners. Be that as it may the consequence of the accuseds' guilty plea has grave financial ramification on both the owners and the accuseds in that

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the two vessels may be the only tools of earning income for the owners. It is a simple application of the basic principle of one's right to be heard and hence the owners of the vessels ought to have been made aware of the charges against the accuseds.

[11] Accordingly it is my view that, because of the omissions mentioned above, it would be unsafe to accept the plea of guilty of the accuseds and hence I set aside the whole proceedings and order that the plea be taken before another magistrate as soon as possible.

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